Supreme Court, U.S.
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No. 97-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHARLES H. KUIPER, SR., MAE E. KUIPER AND CHARLES A. KUIPER, JR., d/b/a/ CHARLES H. KUIPER & SON FARMS,

Petitioner,

v.

AMERICAN CYANAMID COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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30 PP

QUESTIONS PRESENTED

1. Does the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1994 & Supp. 1997), preempt state law misrepresentation claims that are based on a single oral statement which merely reiterated information contained on a herbicide's federally approved labeling?

2. Does Wisconsin's "fundamental fairness" standard for nonmutual offensive collateral estoppel afford preclusive effect to a state supreme court's federal preemption ruling that involves different facts and is inconsistent with previous cases in favor of the defendant?

3. Does the three-year limitations period included within Wis. Stat. § 100.18 (1989) bar a misrepresentation claim brought under that provision where the plaintiffs filed suit more than three years after having sufficient information to bring an action independent of any additional information subsequently discovered by their attorney in a different suit?

RULE 29.6 STATEMENT

Respondent American Cyanamid Company is a wholly owned subsidiary of American Home Products Corporation. American Cyanamid Company has one nonwholly owned subsidiary: Immunex Corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

I. THERE IS NO SPLIT OF AUTHORITY ON FIFRA PREEMPTION WARRANTING SUPREME COURT REVIEW 7

A. The Vast Majority of Federal and State Courts Agree On the Scope of FIFRA Preemption 8

B. The Seventh Circuit's Opinion Is Consistent With Numerous Other Cases Regarding FIFRA Preemption of State Law Claims Based On "Off-Label" Representations 11

C. The Seventh Circuit's Opinion Does Not Conflict With the Supreme Court Preemption Cases Cited By Petitioner 15

D. The Preemption Issues Decided in *Kuiper* and *Gorton* Are Different 17

II. THERE ARE NO OTHER ISSUES PRESENTED BY THIS CASE THAT WARRANT SUPREME COURT REVIEW 19

A. This Case Does Not Involve Equal Protection Issues 19

B. This Case Does Not Present Any Important Issues Regarding the Application of the Full Faith and Credit Act 22

C. This Case Does Not Raise Any Other Important Issues 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Ackles v. Luttrell, 561 N.W.2d 573 (Neb.), *cert. denied*, 118 S. Ct. 329 (1997) 8,9,16-17

American Cyanamid Co. v. Gorton, No. 95-669 (filed Oct. 25, 1995) 5

Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993) 8,9

Barnes v. Sandoz Crop Protection Corp., 938 P.2d 95 (Ariz. Ct. App. 1997) 12

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) ... 10

Chemical Specialities Mfrs. Ass'n v. Allenby, 958 F.2d 941 (9th Cir. 1992) 10

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 7,17

Didier v. Drexel Chem. Co., 938 P.2d 364 (Wash. Ct. App. 1997) 17

Eide v. E.I. du Pont de Nemours & Co., 542 N.W.2d 769 (S.D. 1996) 8

Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) 10

Goodwin v. Bacon, 896 P.2d 673 (Wash. 1995) 8,13

Gorton v. American Cyanamid Co., 533 N.W.2d 746 (Wis. 1995), *cert. denied*, 516 U.S. 1067 (1996) 4,5,9,18

Grenier v. Vermont Log Bldgs., Inc., 96 F.3d 559 (1st Cir. 1996) 8

Hawkins v. Leslie's Poolmart, 965 F. Supp. 566 (D.N.J. 1997) 16

Hopkins v. American Cyanamid Co., 666 So. 2d 615 (La. 1996) 8,9,14

Hue v. Farmboy Spray Co., 896 P.2d 682 (Wash. 1995) 9,13

Hughes v. Tennessee Seeds of Brownsville, Inc., No. 02A01-9611-CV-00290, 1997 WL 710935 (Tenn. Ct. App. Nov. 17, 1997) 14

Jenkins v. Amchem Prod. Inc., 886 P.2d 869 (Kan. 1994), *cert. denied*, 516 U.S. 820 (1995) 8,9,13

King v. E.I. du Pont de Nemours & Co., 996 F.2d 1346 (1st Cir. 1993) 10

Koch v. Shell Oil Co., 173 F.R.D. 288 (D. Kan. 1997) 16

Kuiper v. American Cyanamid Co., 913 F. Supp. 1236 (E.D. Wis. 1996), *aff'd*, 131 F.3d 656 (7th Cir. 1997), *pet. for cert. filed*, No. 97-1453 (Mar. 9, 1998) ..... *passim*

Kuiper v. American Cyanamid Co., 960 F. Supp. 1378 (E.D. Wis. 1997) 5,6,16

Lewis v. American Cyanamid Co., 682 A.2d 724 (N.J. Super. Ct. App. Div. 1996), *cert. granted*, 697 A.2d 546 (N.J. 1997) 17

Lowe v. Sporicidin Int'l, 47 F.3d 124 (4th Cir. 1995) 8,9,12,17

MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994) 8

Malone v. American Cyanamid Co., 649 N.E.2d 493 (Ill. App. Ct. 1995) 14,15

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) 23,24

Medtronic v. Lohr, 518 U.S. 470 (1996) 15,16,17

Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984) 23

New York State Pesticide Coalition v. Jorling, 874 F.2d 115 (2d Cir. 1989) 10,11

Papas v. Upjohn Co., 985 F.2d 516 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993) 8,9,13

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 21

Quest Chem. Corp. v. Elam, 898 S.W.2d 819 (Tex. 1995) 8

Reutzel v. Spartan Chem. Co., 903 F. Supp. 1272 (N.D. Iowa 1995) 10

Schuver v. E.I. du Pont de Nemours & Co., 546 N.W.2d 610 (Iowa), *cert. denied*, 117 S. Ct. 274 (1996) 8,9,13

Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993) 10,16

Sherman v. Claire Mfg. Co., 657 N.Y.S.2d 453 (N.Y. App. 1997) 17

Sowers v. Johnson & Johnson Med., Inc., 867 F. Supp. 306 (E.D. Pa. 1994) 13

Taylor AG Indus. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995) 8,12

Welchert v. American Cyanamid Co., 59 F.3d 69 (8th Cir. 1995) 8,12,21

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 15,16

Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993) 9,11,21

STATUTES AND RULES

U.S. Const. art. VI, cl. 2 (Supremacy Clause) 1

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1994 & Supp. 1997) i

7 U.S.C. § 136a 2

7 U.S.C. § 136j(a)(1)(B)..... 2,12,15,17

7 U.S.C. § 136(u)..... 3

7 U.S.C. § 136v(a)..... 15,16

7 U.S.C. § 136v(b)..... *passim*

28 U.S.C. § 1738 (1994)..... 6,23,24

42 U.S.C. § 1983 & 1985 23

Wis. Stat. § 100.18 (1989)..... i,3,5,6

Fed. R. Civ. P. 56(f) 5-6

Fed. R. Civ. P. 60(b)..... 6

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BRIEF IN OPPOSITION

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI, cl. 2 (Supremacy Clause) provides:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

7 U.S.C. § 136j(a)(1)(B) provides:

> "it shall be unlawful for any person in any State to distribute or sell to any person -- any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under [7 U.S.C. § 136a] of this title."

STATEMENT OF THE CASE

Petitioners (the Kuipers) are requesting this Court to review the Seventh Circuit's carefully reasoned opinion as to why their state law misrepresentation claims are preempted by § 136v(b) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Section 136v(b) expressly prohibits states from imposing "any requirements" for pesticide labeling which are "in addition to or different from" those imposed under FIFRA by the United States Environmental Protection Agency ("EPA"). 7 U.S.C. § 136v(b). As discussed below, there is overwhelming federal and state authority holding that § 136v(b) expressly preempts any state law damages claim that challenges, either directly or indirectly, the adequacy of the information provided on a pesticide's EPA-approved labeling.

According to Petitioners, their 1988 "follow" (i.e., rotational) corn crop was damaged by their use in 1987 of SCEPTER, a FIFRA-registered soybean herbicide manufactured by Respondent American Cyanamid Company

("Cyanamid").1/ The "Rotational Crop Restrictions" section of SCEPTER's EPA-approved labeling stated that rotational corn can be planted 11 months after the last SCEPTER application. Petitioners read and followed that label representation. They suspected that SCEPTER "carryover" caused their reduced crop yield, and in December 1989 requested compensation from Cyanamid, which declined to pay.

The *only* "off-label" representation that Petitioners heard before buying and using SCEPTER was an alleged oral statement by an independent farm supply dealer (Donald Spangenberg) that SCEPTER was safe for follow corn. Petitioners admitted during their depositions that they *never saw* any SCEPTER advertising or promotional materials, which their petition erroneously describes as "liability evidence" involved in this case. Petition at 5. Furthermore, Spangenberg testified that the only literature he had read about SCEPTER was its EPA-approved labeling.

Petitioners filed a Wisconsin state court damages suit in April 1993, essentially alleging that Cyanamid had misrepresented the safety of SCEPTER for rotational corn. Cyanamid removed the case to federal district court, and in October 1994 filed a summary judgment motion on the ground that § 136v(b) of FIFRA preempts all of Petitioners' claims because they necessarily challenge the adequacy of the 11-month rotational crop restriction on SCEPTER's EPA-approved labeling. Cyanamid also filed a motion to dismiss Petitioners' Wis. Stat. § 100.18 fraudulent representation claim on the alternative ground that the three-year limitations

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1/ Herbicides fall within FIFRA's definition of "pesticide." 7 U.S.C. § 136(u).

period for bringing such a claim had expired before their suit was filed.

In November 1994 Petitioners filed a motion for imposition of collateral estoppel based on the February 1993 state trial court damages award subsequently affirmed by the Wisconsin Supreme Court in *Gorton v. American Cyanamid Co.*, 533 N.W.2d 746 (Wis. 1995), *cert. denied*, 516 U.S. 1067 (1996), a SCEPTER carryover case brought by different plaintiffs represented by the same counsel as Petitioners. Despite Petitioners' explicit admission that they had not seen any SCEPTER advertising or promotional materials prior to purchasing and using SCEPTER, they utilized the vehicle of their collateral estoppel motion to deposit with the district court virtually all of the SCEPTER advertising and promotional materials involved in *Gorton*. Petitioners also requested the district court to defer ruling on the parties' pending motions until the state supreme court rendered its decision in *Gorton*. Cyanamid neither joined nor opposed that request.

The Wisconsin Supreme Court issued its ruling in *Gorton* in June 1995. The court held that FIFRA did not preempt the plaintiffs' negligent misrepresentation claim because it was based on SCEPTER rotational crop safety statements that "had no relation to the labeling." 533 N.W.2d at 755. The court concluded that the statements were unrelated to SCEPTER's labeling apparently because they "were made through written product such as promotional materials, advertisements, technical reports, as well as

through oral statements by American Cyanamid's technical service representatives." *Id.*[2/]

The federal district court "gave serious consideration to the views of the Wisconsin Supreme Court," but in February 1996 granted summary judgment in favor of Cyanamid, rejecting *Gorton*'s approach as "arbitrary" and holding that FIFRA preempts all of Petitioners' claims. *Kuiper v. American Cyanamid Co.*, 913 F. Supp. 1236, 1243, 1244 (E.D. Wis. 1996). The court also held that Petitioners' Wis. Stat. § 100.18 fraudulent representation claim was time-barred. *Id.* at 1245. Petitioners moved pursuant to Fed. R. Civ. P. 60(b) for relief from the judgment. After considering Petitioners' motion, the district court in February 1997 issued a second opinion, again concluding that Petitioners' claims are preempted. *Kuiper v. American Cyanamid Co.*, 960 F. Supp. 1378 (E.D. Wis. 1997).[3/]

2/ Cyanamid subsequently filed in *Gorton* a petition for a writ of certiorari, which was limited to the constitutionality of the trial court's post-verdict award of attorney fees pursuant to Wis. Stat. § 100.18. *American Cyanamid Co. v. Gorton*, No. 95-669 (filed Oct. 25, 1995). Although Cyanamid did not seek review of the state supreme court's FIFRA preemption ruling, the certiorari petition stated that "Cyanamid *strongly disagrees* with the preemption holding." Cyanamid Pet. at 9, n.3 (emphasis added). Thus, there is absolutely no basis for Petitioners' assertion that "[t]he fact that AmCy did not present any issue relating to federal preemption in its Petition for Certiorari would suggest that AmCy had accepted the validity of the decision by the Wisconsin Supreme Court regarding federal preemption." Pet. at 17.

3/ By the time the district court issued its initial summary judgment ruling in February 1996, Petitioners already had conducted extensive discovery against Cyanamid. Cyanamid was not in violation of any discovery duty at the time of the ruling. Petitioners never requested the court to defer ruling on summary judgment due to any outstanding discovery demands, and never submitted an affidavit under Fed. R. Civ.

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The Seventh Circuit affirmed:

First, the court of appeals held that Petitioners' Wis. Stat. § 100.18 fraudulent representation claim is time-barred because "although the Kuipers may have been unaware at first that American Cyanamid knew SCEPTER could damage follow corn, the Kuipers had enough information to bring suit for fraudulent representation within the limitations period." *Kuiper*, 131 F.3d 656, 660 (7th Cir. 1997).

Second, as to the remaining misrepresentation claims, the court of appeals rejected Petitioners' contention that the Wisconsin Supreme Court's decision in *Gorton* precludes consideration of FIFRA preemption. The court found no reason to consider whether *Gorton* should be afforded "full faith and credit" under 28 U.S.C. § 1738 (1994) since "*Gorton*'s holding on preemption would not have issue preclusive effect on the Kuipers' claims *under Wisconsin law* [which] permits nonmutual offensive collateral estoppel only in cases in which issue preclusion would meet a 'fundamental fairness' standard." 131 F.3d at 661 (emphasis added). The court held that "[u]nder this fundamental fairness test, issue preclusion is inappropriate here." *Id.*

Third, the court of appeals concluded that Petitioners' misrepresentation claims are preempted by FIFRA. The court explained that "[t]he Kuipers cannot automatically avoid FIFRA preemption simply because they challenge

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P. 56(f) providing reasons for a postponement. Instead, after the court ruled, Petitioners in their Rule 60(b) motion requested the court to reconsider its summary judgment decision based on recently discovered documents. The court did so, but found that they do not change the conclusion that FIFRA preempts Petitioners' claims. *See Kuiper,* 960 F. Supp. at 1381.

alleged misrepresentations that were made separately from the label." *Id.* at 662. "FIFRA preempts the Kuipers' claims because the alleged misrepresentation that SCEPTER is 'safe' for follow corn essentially restates the rotational crop restriction on the label." *Id.* at 666. "In challenging the alleged misrepresentations, the Kuipers challenge the label itself, and hence their claims are preempted." *Id.* at 663.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SPLIT OF AUTHORITY ON FIFRA PREEMPTION WARRANTING SUPREME COURT REVIEW

Petitioners' assertion that "the scope of FIFRA preemption is in a state of confusion on a national level" is patently incorrect. Pet. at 15. In reality, there is an overwhelming consensus among federal and state courts regarding the scope of FIFRA preemption, including as to claims based on "off-label" representations that do not substantially differ from the information contained on a pesticide's EPA-approved labeling (e.g., Spangenberg's statement that SCEPTER is safe for follow corn). The Seventh Circuit's opinion in *Kuiper* is entirely consistent with this expansive body of FIFRA preemption case law, which has developed in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding in a case involving the Federal Cigarette Labeling and Advertising Act that a federal statutory provision preempting states from imposing additional "requirements" encompasses state law damages claims). In contrast, the Wisconsin Supreme Court's poorly reasoned and result-driven FIFRA preemption ruling in *Gorton* is an aberration which has had little if any impact, even in Wisconsin. There simply is no conflict on FIFRA preemption worthy of this Court's review.

A. The Vast Majority of Federal and State Courts Agree On the Scope of FIFRA Preemption

A multitude of federal and state courts have held that § 136v(b) of FIFRA expressly preempts any state law claim which directly or indirectly implicates the adequacy of the warnings or other information on a pesticide's EPA-approved labeling. This includes all eight federal circuits which have considered the issue in light of *Cipollone*. *See Kuiper; Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996); *Welchert v. American Cyanamid Co.*, 59 F.3d 69 (8th Cir. 1995); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993) ("*Papas II*"); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993) ("*Arkansas-Platte II*"). Many state supreme courts have reached the same conclusion. *See, e.g., Ackles v. Luttrell*, 561 N.W.2d 573 (Neb.), *cert. denied*, 118 S. Ct. 329 (1997); *Schuver v. E.I. du Pont de Nemours & Co.*, 546 N.W.2d 610 (Iowa), *cert. denied*, 117 S. Ct. 274 (1996); *Jenkins v. Amchem Prod. Inc.*, 886 P.2d 869 (Kan. 1994), *cert. denied*, 516 U.S. 820 (1995); *Hopkins v. American Cyanamid Co.*, 666 So. 2d 615 (La. 1996); *Eide v. E.I. du Pont de Nemours & Co.*, 542 N.W.2d 769 (S.D. 1996); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *Goodwin v. Bacon*, 896 P.2d 673 (Wash. 1995).

Furthermore, there is broad agreement among federal and state courts that FIFRA does not preempt claims which in substance and effect are unrelated to labeling. *See, e.g., Grenier*, 96 F.3d at 564; *Welchert*, 59 F.3d at 72; *Taylor*, 54

F.3d at 560-61, 563; *Lowe*, 47 F.3d at 129; *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747-48 (4th Cir. 1993) ("*Worm II*"); *Jenkins,* 886 P.2d at 883-84; *Hopkins,* 666 So. 2d at 622; *Hue v. Farmboy Spray Co.*, 896 P.2d 682, 693 (Wash. 1995); *see also Gorton,* 533 N.W.2d at 754 n.8.

Thus, contrary to Petitioners' assertion, there most certainly is not a "multitude [of] irreconcilable decisions regarding the extent, if any, to which FIFRA preempts state law remedies." Pet. at 13. Instead, there is virtual uniformity among federal and state courts which have considered FIFRA's preemptive scope in light of this Court's opinion in *Cipollone*. *See Hopkins,* 666 So. 2d at 622 (noting that "since *Cipollone* there has developed a strong consensus among the federal courts of appeals as to FIFRA's pre-emptive scope"); *Hue*, 896 P.2d at 691 (noting that there has been "a 'tsunami' wave of precedent, including every one of the eight federal circuit courts that have addressed the issue of FIFRA preemption since *Cipollone*, and the overwhelming majority of federal district court and state courts as well"). Indeed, this Court has repeatedly declined review of FIFRA preemption cases decided in light of *Cipollone*. *See Ackles v. Luttrell; Schuver v. du Pont; Jenkins v. Amchem Prod. Inc.; Papas II; Arkansas-Platte II.*[4/] While each court must determine whether a particular state law claim in a particular suit would have the effect of imposing additional or different labeling requirements, there is no conflict among courts

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4/ *Papas II and Arkansas-Platte II* were rendered following remand from this Court for further consideration in light of *Cipollone*. As indicated, certiorari was subsequently denied in both cases.

regarding the principle that FIFRA preemption extends to all such claims, but no further.5/

5/ To try to create a conflict where none exists, Petitioners cite *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), an old and widely repudiated decision which was effectively overruled by *Cipollone*. Based on the theory that a damages award does not impose state law "requirements," *Ferebee* held that § 136v(b) of FIFRA does not preempt state law tort claims for inadequate labeling. The Supreme Court held in *Cipollone*, however, that a "federal statute barring additional 'requirement[s] . . . "imposed under state law" ' pre-empts common-law claims." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (quoting *Cipollone*, 505 U.S. at 522). Thus, as the Seventh Circuit explained in *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 370 (7th Cir. 1993), *Ferebee*'s theory "evaporated" when the Supreme Court decided *Cipollone*. *See also King v. E.I. du Pont de Nemours & Co.*, 996 F.2d 1346, 1351 (1st Cir. 1993) ("the District of Columbia Circuit did not have the benefit of the Supreme Court's subsequent analysis and ruling in *Cipollone*); *Reutzel v. Spartan Chem. Co.*, 903 F. Supp. 1272, 1280 n.3 (N.D. Iowa 1995) ("The *Ferebee* decision has been impliedly overruled by the Supreme Court's decision in *Cipollone* and can no longer be viewed as persuasive.").

Petitioners also cite two other pre-*Cipollone* court of appeals decisions, neither of which involved FIFRA preemption of tort claims or otherwise has any direct bearing on the issues raised by the petition. In *Chemical Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941 (9th Cir. 1992), the court of appeals held that FIFRA does not preempt a state statute ("Proposition 65") which requires pesticide manufacturers to provide certain point-of-sale warning signs. The court itself excepted tort claims from its holding, explaining that "*the argument against product liability suits for inadequate labeling is strong*." *Allenby*, 958 F.2d at 948 (emphasis added). In *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989), the court held that FIFRA did not preempt a state agency from promulgating pesticide use regulations which required commercial applicators to provide certain notifications to the public. There is no suggestion in *Jorling* that manufacturers of FIFRA-registered pesticides can or should be subject to additional warning requirements imposed by state law, much less through state law tort claims. To the contrary, the court of appeals emphasized that FIFRA "place[s] the

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B. The Seventh Circuit's Opinion Is Consistent With Numerous Other Cases Regarding FIFRA Preemption of State Law Claims Based On "Off-Label" Representations

The court of appeals held that because Spangenberg's statement that SCEPTER is safe for follow corn "essentially repeats the restrictions on the label, the Kuipers' claims challenging his statement necessarily challenge the label itself and are therefore preempted." *Kuiper*, 131 F.3d at 665. In reaching this conclusion, the court explained that its "sister circuits have held that even off-label statements are preempted if they merely repeat information in the label itself." *Id.* at 662.

For example, in *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993) ("*Worm II*"), another SCEPTER carryover case, the plaintiffs argued that FIFRA did not preempt their misrepresentation claims because they were based on written advertising statements regarding SCEPTER's safety to follow corn. The Fourth Circuit squarely rejected this argument and held that the plaintiffs' claims were preempted: "To allow the Worms to argue that the warning language which appears on point-of-sale or other promotional material is inadequate when that language is identical to that approved by the EPA would in effect allow the establishment of an additional or different state law requirement concerning adequate warning language." 5 F.3d at 748.

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'labeling' of pesticides within the *singular province of the EPA*." *Jorling*, 874 F.2d at 117 (emphasis added).

Building upon *Worm*, the Fourth Circuit in *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995), a personal injury suit, subsequently held that FIFRA preempts any claim based on an off-label representation which does not "substantially differ" from the warnings or other information on a pesticide's EPA-approved labeling. The court based this test for preemption on § 136j(a)(1)(B) of FIFRA, which prohibits pesticide advertising and promotional statements that "substantially differ" from a pesticide's EPA-approved labeling. *Id.* at 127, 130 (citing 7 U.S.C. § 136j(a)(1)(B)). In response to Petitioners' "attempt to situate their claim under *Lowe*'s protective umbrella," the court of appeals below discussed why it "do[es] not believe that Spangenberg's statement that SCEPTER is 'safe' for follow corn substantially differs from the rotational crop restriction on the label." *Kuiper,* 131 F.3d at 663, 665.[6/]

Additional federal and state crop damage cases hold that FIFRA preempts claims based on off-label promotional statements which repeat, or do not substantially differ from, the information on a pesticide's labeling. *See, e.g., Welchert v. American Cyanamid,* 59 F.3d at 70 (herbicide carryover case holding that FIFRA preempts claim based on Cyanamid's oral representation that follow corn could be safely planted in accordance with label instructions); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d at 563 (FIFRA preempts claim based on distributor's oral representation regarding crop safety where there was "no evidence establishing that

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6/ The court noted that the Eleventh Circuit in *Papas II* and Ninth Circuit in *Taylor AG Indus. v. Pure-Gro* appear to go farther than *Lowe*, holding that *any* failure to warn claim based on an off-label representation is preempted, but that it did "not need to choose between these two approaches . . . for FIFRA preempts the Kuipers' claim under either rule." *Kuiper,* 131 F.3d at 663.

[the distributor] made any statements that were inconsistent with or went beyond the labels"); *Barnes v. Sandoz Crop Protection Corp.*, 938 P.2d 95, 97 (Ariz. Ct. App. 1997) (FIFRA preempts negligent misrepresentation claim as to herbicide's crop safety because "there is no evidence that [the manufacturer] advised the farm in any way inconsistent with the instructions on the [herbicide's] label"); *Schuver v. du Pont,* 546 N.W.2d at 614-15 (negligent marketing claims for crop damage due to herbicide carryover are preempted "because they require -- on [the manufacturer's] label -- additional or different information from that required under the FIFRA"); *Hue v. Farmboy Spray Co.,* 896 P.2d at 693 (inadequate marketing claim preempted because it "was merely another way of contending that the labels should have warned against use"); *Goodwin v. Bacon*, 896 P.2d at 681 (herbicide crop damage case "refusing to distinguish non-label failure to warn claims").

Numerous non-crop damage cases also recognize the same principle. *See, e.g.*, *Papas II*, 985 F.2d at 519 ("claims challenging the adequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling and packaging failed to warn the user," and therefore are preempted); *Sowers v. Johnson & Johnson Med., Inc.*, 867 F. Supp. 306, 313 (E.D. Pa. 1994) (rejecting "plaintiffs' argument that FIFRA's preemption is limited to 'labels' and 'labeling' and does not extend to claims based on . . . advertising and promotional material"); *Jenkins v. Amchem Prod.,* 886 P.2d at 882 ("[A]ny negligence or strict liability failure to warn claim based on a claim that communication by means other than labeling was inadequate necessarily challenges the label . . . ."). Thus, the Seventh Circuit's opinion in *Kuiper* is consistent with substantial authority that FIFRA preempts claims based on off-label statements which do not substantially differ from EPA-approved labeling.

In support of their erroneous assertion that there are "irreconcilable" conflicts, Petitioners cite *Hughes v. Tennessee Seeds of Brownsville, Inc.*, No. 02A01-9611-CV-00290, 1997 WL 710935 (Tenn. Ct. App. Nov. 17, 1997), which actually is *consistent* with the opinion below and the foregoing authorities. *Hughes* holds that FIFRA does not preempt a breach of express warranty claim based on product effectiveness representations which "*exceeded or differed from the information contained in the product's label.*" *Id.* at *6 (emphasis added). The court agreed that express warranty claims are preempted "to the extent they are based upon inadequacies in labeling," and that "the result would be different" only if "the defendants conveyed information or made assurances which *went beyond the label recommendations.*" *Id.* at *5 (emphasis added). This is consistent with the principle that FIFRA preempts claims based on off-label statements which repeat, or do not substantially differ from, information on the labeling.

Petitioners also cite *Hopkins v. American Cyanamid*, in which the Louisiana Supreme Court held that FIFRA preempts state law claims "premised upon improper labeling and/or failure to warn," but found that the plaintiffs' defective product and express warranty claims "are not preempted by FIFRA as they do not relate to labeling." *Hopkins*, 666 So. 2d at 622, 623. Nothing in *Hopkins* suggests that claims based on off-label statements which repeat the information on a pesticide's EPA-approved labeling avoid preemption.

Finally, Petitioners cite *Malone v. American Cyanamid Co.*, 649 N.E.2d 493 (Ill. App. Ct. 1995). Unlike the situation here, *Malone* involved allegations that SCEPTER did not perform its intended function in controlling soybean weeds despite advertising claims to the contrary (i.e., follow crop safety claims were not at issue).

The court held that FIFRA did not preempt the plaintiffs' implied warranty claims because they "made no reference to any information set forth on the labels," but instead were based solely upon advertising. *Id.* at 498. Unfortunately, the court overlooked § 136j(a)(1)(B) of FIFRA, which as discussed above, prohibits advertising and promotional statements that substantially differ from a pesticide's labeling. Instead, the court based its holding on the mistaken belief that advertising is not regulated by FIFRA. *Id.* Despite the court's misunderstanding of FIFRA, *Malone* nowhere suggests that preemption is inapplicable to claims, like Petitioners' here, which have the effect of challenging EPA-approved labeling statements.

C. The Seventh Circuit's Opinion Does Not Conflict With the Supreme Court Preemption Cases Cited By Petitioners

There is no basis for Petitioners' contention that the opinion below conflicts with preemption principles established by this Court. To the contrary, the court of appeals discussed and followed the preemption analytical framework set forth in *Cipollone* and *Medtronic v. Lohr,* 518 U.S. 470 (1996). *See Kuiper,* 131 F.3d at 661-62. According to Petitioners, however, the court did not "determine preemption issues with the guidance and light" of *Medtronic*, and also *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597 (1991). Pet. at 12.

In *Mortier,* the Court held that FIFRA does not preempt local governments from adopting ordinances that restrict pesticide use. Although *Mortier* does not address preemption of state law tort claims, the Court emphasized that FIFRA differentiates between a state's authority to regulate pesticide "sale or use," which is preserved by § 136v(a) of FIFRA, and a state's imposing additional or

different labeling requirements, which is expressly preempted by § 136v(b). *See Mortier,* 501 U.S. at 613 (comparing 7 U.S.C. § 136v(a) & (b)). Indeed, the Court explained that labeling "fall[s] within an area that FIFRA's 'program' pre-empts." *Id.* at 615. Thus, the Seventh Circuit's holding that FIFRA preempts claims which have the effect of challenging a pesticide's EPA-approved labeling is consistent with *Mortier's* recognition of FIFRA's preemption of state labeling regulation. *See Shaw v. Dow Brands,* 994 F.2d at 370 (explaining that in *Mortier* the Supreme Court noted "the absolutist nature of FIFRA's pre-emption in the labeling and packaging context even as it held that FIFRA does not pre-empt generalized state regulation of pesticides").

The other case cited by Petitioners, *Medtronic v. Lohr,* involved preemption of tort claims for an allegedly defective heart pacemaker lead regulated under a significantly different statutory scheme (the Medical Device Amendments of the Federal Food, Drug, and Cosmetic Act). The district court below analyzed *Medtronic*, and found that

> the scope of FIFRA preemption is much narrower than that rejected in *Medtronic* and more analogous to what the Supreme Court upheld in *Cipollone*. *Medtronic* simply does not alter the Court's conclusion in this case.

Kuiper, 960 F. Supp. at 1384. Other courts also have concluded that "*Medtronic* did not alter the law of FIFRA preemption." *Hawkins v. Leslie's Poolmart*, 965 F. Supp. 566, 572 (D.N.J. 1997); *see, e.g., Koch v. Shell Oil Co.,* 173 F.R.D. 288, 289 (D. Kan. 1997) (there is "no reason to believe" that prior FIFRA preemption cases would have been decided differently with the benefit of *Medtronic*); *Ackles v.*

Luttrell, 561 N.W.2d at 578 (explaining that in *Medtronic* "five Justices of the Supreme Court reiterated the sentiments put forth in *Cipollone* that state common-law claims can be equated with state requirements"); *Lewis v. American Cyanamid Co.*, 682 A.2d 724, 729-31 (N.J. Super. Ct. App. Div. 1996), *cert. granted*, 697 A.2d 546 (N.J. 1997) (finding that *Medtronic* is not inconsistent with *Cipollone* and that it has no effect on FIFRA preemption of claims for inadequate labeling); *Sherman v. Claire Mfg. Co.*, 657 N.Y.S.2d 453 (N.Y. App. 1997) (prior state appellate ruling on FIFRA preemption "not inconsistent" with *Medtronic*); *Didier v. Drexel Chem. Co.*, 938 P.2d 364, 366-67 (Wash. Ct. App. 1997) (discussing reasons why "*Medtronic* is not controlling").7/

D. The Preemption Issues Decided in *Kuiper* and *Gorton* Are Different

Because the preemption issues decided in *Kuiper* and *Gorton* actually are different, Petitioners' assertion that the

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7/ In an attempt to support their contention that the court of appeals below somehow deviated from Supreme Court preemption principles, Petitioners also cite *Cipollone*'s holding that the Federal Cigarette Labeling and Advertising Act does not preempt fraudulent misrepresentation claims based on a "general duty not to deceive." Pet. at 15 n.3; *see Cipollone*, 505 U.S. at 528-29. Unlike the Cigarette Act, however, FIFRA imposes a *specific statutory duty* not to deceive -- the duty imposed by § 136j(a)(1)(B) not to make representations in connection with advertising or promotion of a pesticide which "substantially differ" from the pesticide's EPA-approved labeling. As discussed above, there is ample case law consistent with the principle that state law claims based on alleged misrepresentations which do not substantially differ from the information on a pesticide's labeling, and hence do not violate FIFRA's statutory duty not to deceive, are preempted. *See Lowe v. Sporicidin Int'l*, 47 F.3d at 127, 130.

Seventh Circuit "decided an important federal question in a way that admittedly conflicts with the decision of Wisconsin's court of last resort in *Gorton*" is incorrect. Pet. at 8-9. The two courts reached different conclusions regarding the *factual* question of whether an off-label representation that SCEPTER is safe for follow corn is essentially the same as the rotational crop representation on SCEPTER's EPA-approved labeling. In *Gorton*, the Wisconsin Supreme Court found that this off-label representation "had no relation to the labeling or packaging of the herbicide." *Gorton*, 533 N.W.2d at 755 (emphasis added). In *Kuiper*, however, the court of appeals found that the same representation "essentially repeat[s] the follow crop restrictions on SCEPTER's label." *Kuiper*, 131 F.3d at 663.

As a result of the courts' different findings regarding this factual question, the FIFRA preemption issue that each court decided was different. In *Gorton*, the state supreme court addressed the issue of whether FIFRA preempts an off-label representation that it found was unrelated to the labeling. In *Kuiper*, the court of appeals decided whether FIFRA preempts an off-label representation that it found repeats information on the labeling. Therefore, because these preemption issues are different, *Kuiper*'s preemption holding does not directly conflict with *Gorton*'s. Indeed, *Gorton* appears to acknowledge that claims which challenge a pesticide's labeling are preempted. *See Gorton*, 533 N.W.2d at 753.[8/]

8/ The preemption rulings would have conflicted only if *both* courts had found that the off-label representation that SCEPTER is safe for follow corn is substantially different than the information on SCEPTER's labeling, and then reached different conclusions on whether a claim based on that representation is preempted. Similarly, the rulings would have conflicted if *both* courts had found that the representation

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II. THERE ARE NO OTHER ISSUES PRESENTED BY THIS CASE THAT WARRANT SUPREME COURT REVIEW

Petitioners' assertion that certiorari should be granted because "this case presents important issues" wholly apart from the scope of FIFRA preemption is similarly unavailing. Pet. at 16. They employ several tactics in an attempt to elevate the perceived importance of the remaining issues addressed in their petition, including reliance on the Constitutions of the United States and the State of Wisconsin, as well as repeated references to notions of "equality," "justice," and "fairness." Despite their best efforts, Petitioners cannot obscure the fact that these remaining points relate almost exclusively to the application of state law issue preclusion principles, and simply are not worthy of this Court's review.

A. This Case Does Not Involve Equal Protection Issues

The court of appeals flatly rejected Petitioners' contention that the Wisconsin Supreme Court's decision in *Gorton* precludes consideration of FIFRA preemption. Applying Wisconsin law, which "permits nonmutual offensive collateral estoppel only in cases in which issue preclusion would meet a 'fundamental fairness' standard," the court held that "issue preclusion is inappropriate here." *Kuiper*, 131 F.3d at 661. In an effort to persuade this Court to review the Seventh Circuit's well-reasoned opinion as to why *Gorton* does not have issue preclusive effect, Petitioners

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was not substantially different than the labeling, and then reached different conclusions on whether FIFRA preempts claims based on the representation. Neither is the case here.

have invoked the Fourteenth Amendment of the Constitution and asserted that they are the victims of unequal treatment under the law. *See* Pet. at 16-18. This is clearly not the case. The arguments which Petitioners have attempted to reframe in constitutional terms involve the application of issue preclusion, not equal protection principles.

Petitioners assert that the court of appeals' decision implicates equal protection principles in two different respects. First, Petitioners contend that they personally have been afforded "different treatment" under the law in that "Wisconsin's court has given Gorton Farms a legal remedy for the damages caused by [Cyanamid's] wrongful conduct [whereas] [t]he federal courts have denied the Kuipers a legal remedy for the damages [Cyanamid] caused by the same wrongful conduct." *Id.* at 17. This argument fails to acknowledge, however, the Seventh Circuit's express finding that the alleged wrongful conduct at issue in *Gorton* and *Kuiper* is *not* the same. Indeed, the court concluded that allowing Petitioners to apply issue preclusion offensively in this case would be fundamentally unfair to Cyanamid in part because "the Kuipers' claims involve different alleged misrepresentations than those at issue in *Gorton*." *Kuiper*, 131 F.3d at 661. As discussed above, the Wisconsin Supreme Court in *Gorton*, based on its finding that the alleged misrepresentations in that case were unrelated to SCEPTER's labeling, actually addressed a different FIFRA preemption issue than the court of appeals, which found that the alleged misrepresentation in this case repeated what was on the labeling. As the court explained, "FIFRA preemption analysis turns in part on how far the particular alleged misrepresentations stray from the information contained in the product label." *Id.* Thus, any "different treatment" received by Petitioners in this case is attributable to

differences in factual findings between this case and *Gorton*.9/

Second, Petitioners assert that the unequal treatment of "neighboring farmers" in *Gorton* and this case also affects the *public's* interest in equal protection under the law. According to Petitioners, "[t]his unequal treatment tends to undermine the assumption of the public that all persons do receive equal treatment in the courts." Pet. at 18. This argument, however, cuts both ways. Whereas Petitioners now claim that it is unfair to permit consideration of FIFRA preemption in this case in light of the Wisconsin Supreme

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9/ Relying on this Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the court of appeals also determined that issue preclusion would not meet Wisconsin's "fundamental fairness" standard in this case because "*Gorton* conflicts with other FIFRA preemption cases." 131 F.3d at 661. As mentioned previously, the conflicting preemption holdings in *Gorton* and *Kuiper* are the result of differing findings of fact regarding whether alleged misrepresentations were related to labeling, not any apparent disagreement about preemption principles. In *Parklane*, this Court recognized that "[a]llowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." 439 U.S. at 330. As discussed above, Cyanamid has prevailed on the issue of whether claims based on off-label representations regarding SCEPTER's safety to follow corn are preempted by FIFRA in several cases. *See, e.g.*, *Worm II* (SCEPTER carryover case holding that FIFRA preempts claim based on statements in promotional materials that were identical to statements contained in SCEPTER's labeling); *see also Welchert*, 59 F.3d at 70 (herbicide carryover case holding that FIFRA preempts claim based on Cyanamid's oral representation that follow corn could be safely planted in accordance with label instructions). Because the Wisconsin Supreme Court's decision in *Gorton* conflicts with these prior decisions, the court of appeals correctly determined that it would be fundamentally unfair to Cyanamid to apply issue preclusion here. *See Parklane*, 439 U.S. at 330 & n.14.

Court's holding in *Gorton*, the court of appeals determined that it would be unfair *not* to permit consideration of FIFRA preemption in light of (among other things) the previous cases in which Cyanamid had prevailed on the issue of whether claims based on off-label representations regarding a herbicide's safety to follow corn are preempted by FIFRA. *See Kuiper*, 131 F.3d at 656. Thus, applying Petitioners' circular reasoning, a decision that *Gorton* has issue preclusive effect could just as easily undermine the public's confidence in the judicial system.

Finally, Petitioners claim that Cyanamid somehow has contributed to a decline in the public's confidence in the judicial system by not "being totally candid with the courts regarding the preemption issue." Pet. at 18. According to Petitioners, the fact that Cyanamid petitioned this Court for a writ of certiorari in *Gorton*, but did not seek review of the state supreme court's FIFRA preemption ruling, suggests that Cyanamid implicitly accepted the validity of that ruling, contrary to Cyanamid's position in this case. *Id.* at 17. In fact, although Cyanamid did not seek review of the state supreme court's FIFRA ruling in *Gorton*, its certiorari petition expressly stated that "Cyanamid *strongly disagrees* with the preemption holding." Cyanamid Pet. at 9, n.3 (emphasis added) (*see* note 2, *supra*). In any event, it is not Cyanamid, but Petitioners themselves, who have engaged in "legal maneuvering" by repeatedly pretending that the written advertising materials involved in *Gorton* are at issue in this case. Pet. at 5, 19.

B. This Case Does Not Present Any Important Issues Regarding the Application of the Full Faith and Credit Act

Petitioners also erroneously assert that the Seventh Circuit's opinion "avoids" important issues relating to the

application of the Full Faith and Credit Act, 28 U.S.C. § 1738, by reaching the conclusion that "issue preclusion is not required in this case under Wisconsin law." Pet. at 18-19. In essence, Petitioners contend that in order to satisfy its "duty" to give full faith and credit to the Wisconsin Supreme Court's decision in *Gorton*, the court of appeals was required to find that *Gorton* precludes consideration of FIFRA preemption in this case. *Id.* It is well-settled, however, that 28 U.S.C. § 1738 actually requires federal courts "to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982)).10/ Thus, the purpose of the Full Faith and Credit Act is to ensure that federal courts "accept the rules chosen by the State from which the judgment is taken" in determining its preclusive

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10/ Petitioners rely upon two decisions of this Court, *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75 (1984) and *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), to suggest that "the resolution of issues relating to full faith and credit have the importance warranting grant of certiorari." Pet. at 19. The issues presented in *Migra* and *Matsushita*, however, differ markedly from the issues presented here. In *Migra*, for example, this Court sought to resolve differences among the federal courts of appeals concerning the claim preclusive effect of a state court judgment in the context of a subsequent suit, under 42 U.S.C. §§ 1983 and 1985, in federal court. *See Migra*, 465 U.S. at 77. In *Matsushita*, the Court ruled on the narrow question of whether § 1738 requires federal courts to give preclusive effect to state court judgments, even when the state judgment at issue incorporates a class action settlement releasing claims solely within the jurisdiction of federal courts. *See Matsushita*, 516 U.S. at 373-74. Thus, *Migra* and *Matsushita* neither support Petitioners' assertion that the Seventh Circuit failed to give full faith and credit to a state court judgment nor stand for the general proposition that issues relating to full faith and credit necessarily warrant Supreme Court review.

effect, and not, as Petitioners suggest, to ensure that federal courts indiscriminately give preclusive effect to state court judgments concerning similar issues. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996).

Applying these well-established principles, the court of appeals found no reason to consider whether *Gorton* should be afforded "full faith and credit" under 28 U.S.C. § 1738 because "*Gorton's* holding on preemption would *not* have issue preclusive effect on the Kuipers' claims *under Wisconsin law* . . . ." *Kuiper*, 131 F.3d at 661 (emphasis added). Accordingly, the court of appeals did not violate any duties imposed by 28 U.S.C. § 1738, and the court's opinion does not raise any important issues relating to full faith and credit that warrant this Court's review.

C. This Case Does Not Raise Any Other Important Issues

As a last resort, Petitioners argue that "[s]ummary judgment was granted in favor of [Cyanamid] while it was violating its duties to provide information in accord with the federal rules relating to discovery." Pet. at 19. Building from this erroneous premise, Petitioners allege that certiorari is necessary because the courts below effectively have "immunized the providers of registered pesticides from misrepresentation liability" and impaired consumers' " 'right to know' all information which bears on their choice of a product." *Id.* at 20. None of these contentions has any merit.

Petitioners' underlying contention that summary judgment was granted while Cyanamid was "violating its duties" to provide discovery is itself wholly incorrect. Petitioners apparently premise this assertion on the February 14, 1996 discovery order of a U.S. Magistrate Judge, which granted in part and denied in part their motion to compel.

Whatever duties Cyanamid had in connection with outstanding discovery requests were specified in that order, which established compliance dates between February 16-29, 1996. *See id.*, App. E at 85a-87a. Thus, Cyanamid was not "violating its duties" on February 15, 1996 when the district court granted summary judgment and dismissed Petitioners' case, thereby rendering the discovery order moot.

Contrary to Petitioners' assertion, moreover, the courts below have not effectively "immunized the providers of registered pesticides from misrepresentation liability." *Id.* at 20. As the court of appeals made clear, FIFRA preempts Petitioners' claims because they are based on an alleged oral representation that essentially restates the rotational crop restriction on SCEPTER's label. *Kuiper*, 131 F.3d at 666. Thus, the FIFRA preemption holding in *Kuiper* (as well as numerous other cases discussed above) is limited to claims based on alleged off-label statements which repeat, or do not substantially differ from, information contained on a pesticide's EPA-approved labeling.

Finally, Petitioners' claim that certiorari is needed to determine whether FIFRA "disenfranchise[s] consumers of their right to know whether their purchases include risks which are unacceptable to them" completely misses the central point of FIFRA's regulatory scheme. Pet. at 20. Under FIFRA, EPA, and not the courts, decides what and how much information to give to consumers regarding pesticides. Petitioners' "right to know" theory is really just another way of attempting to premise liability upon improper labeling or failure to warn and, therefore, is in direct conflict with, and preempted by, § 136v(b) of FIFRA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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